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No. 05-1569

Supreme Court, U.S.
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In The
Supreme Court of the United States

ALAN DeATLEY and DEBRA DeATLEY,
husband and wife,

Petitioners,

vs.

LYNN BARNETT and MARLENE BARNETT,
husband and wife, LOOKOUT POINT PARTNERS,
a Washington partnership,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals
Of Washington, Division 3

REPLY BRIEF ADDRESSED TO NEW POINTS RAISED IN RESPONSE

Submitted by Attorneys for Petitioners:

JENNIE DEDEN BEHLES – Admitted October 16, 2000
Counsel of Record
BEHLES LAW FIRM, P.C.
400 Gold Avenue, SW, Suite 680
P.O. Box 7070
Albuquerque, NM 87194-7070
Phone: (505) 242-7004
Fax: (505) 242-7066

LESLIE ALAN POWERS – Admitted sub nom. February 23, 1981
POWERS & THERRIEN, P.S.
3502 Tieton Drive
Yakima, WA 98902
Phone: (509) 453-8906
Fax: (509) 453-0745

JAMES A. PERKINS – Admitted March 13, 1987
LARSON & PERKINS P.L.L.C.
105 North Third Street
P.O. Box 550
Yakima, WA 98907
Phone: (509) 457-1515

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

Questions presented for review remain the same as set forth at Questions Presented For Review, page I, in the Petition For Writ Of Certiorari.

Respondents in the brief in opposition restate questions presented for review at Brief In Opposition, page I, Questions Presented For Review. This restatement of the questions presented for review, pursuant to Supreme Court Rule 24(a), is not proper as the response may not raise additional questions or change the substance of the questions already presented.

The Respondents Question #1 changes the substance of the questions presented, as it references the omissions from bankruptcy schedules of a "secret assignment of a contract to closely held corporations" and references, "quietly reassign the same contract from closely held corporation back to the debtor". In fact, the document referred to as a "secret assignment" which was, according to the Respondent, assigned then reassigned, does not and never did constitute an asset of the closely held corporation, nor was this previously argued.

Question #2, is apparently rephrased from Respondents question #1(b), as whether or not the DeAtleys lacked standing when his contract rights and obligations were publicly discharged in a Chapter 7 bankruptcy. The contract rights were never discharged and this matter was never addressed by the court below as a lack of standing. This was addressed as a matter of the application of the Washington State doctrine of judicial estoppel. The Washington court found that the debtor was discharged and obtained the benefits of the bankruptcy discharge, so a

QUESTION PRESENTED FOR REVIEW – Continued

right of first refusal considered exercisable by the debtor, which he acquired after bankruptcy from a non-debtor corporation was barred under judicial estoppel.

Respondents' brief, page ii was apparently intended to be a restatement of Petitioner's question #3, (Petition For Writ Of Certiorari, page I). This constitutes a substantial change in the questions presented or alternately presents an additional question, which appellants would contend was not presented to the trial court and considered below.

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INTRODUCTION AND CLARIFICATION OF ISSUES PRESENTED BELOW

Respondents contend that the facts asserted by Petitioners are not the facts at issue, nor are they the facts that support the lower courts consistent dismissal of the lawsuit.

It is undisputed, the DeAtleys scheduled their personal obligation under the 1988 agreement to Barnett as a debt on the schedules, in an attempt to discharge the obligation to build the road and they did obtain the discharge. It was also undisputed that the DeAtleys scheduled the stock in the closely held corporation and that there had been assigned to the closely held corporation, the contract containing a right at first refusal in regard to some real property, which was referred to as such by the court.

The assignment document found in the Response brief following the Conclusion and numbered "311", is a handwritten assignment introduced at trial of the agreement between the DeAtleys individually and Barnett, to a corporation, AD3, whose stock was scheduled in the bankruptcy. Contrary to the representations made by the Respondents, that document specifically says that AD3 company "will finish all parts that may be owing to Barnett (roadway-wise)". It is Respondents' contention that assignment not disclosed to the bankruptcy court and that it was the failure to schedule this assignment, which resulted in the application of the doctrine of judicial estoppel.

This contract was assigned by corporation late. The DeAtleys did not own this asset, on the day of the filing of the petition. This transfer to the corporation had been

made nearly two years prior to the day of the filing of the petition (certainly at a date more than one year of the filing of the petition). The Published opinion in the Court of Appeals of the State of Washington, (Appendix A, page A-1, to Petitioner's brief), shows that court was not referring to failure to disclose an assignment, it was referring to a specific asset or portion of a contract that had been heretofore assigned to AD3. The Court of Appeals says, "after the Barnetts discovered an intervening DeAtley bankruptcy, the trial court granted summary dismissal of the complaint on Barnetts' theory that the DeAtleys' bankruptcy discharged the Barnetts' right of first refusal obligations".

In this opinion (Petition Appendix A-2), the court says, "the DeAtleys didn't separately list the right of first refusal as an asset". The argument was not made, as a failure to disclose an assignment but as, "the failure to separately list the right of first refusal". "Separately list", refers to the fact that the DeAtleys had scheduled the stock in AD3, the corporation to which the contract containing the right at first refusal had been transferred in the assignment document. It is to be noted there was no remaining consideration due to the DeAtleys individually as a result of this transfer. The consideration set forth in that transfer or assignment is that AD3 company will furnish "all part that may be left going to Barnett (roadway-wise)".

ARGUMENT

1. The Washington courts did not apply the judicial estoppel law doctrine to the undisputed facts to bar the

DeAtleys' lawsuit the 1988 agreement. The Respondents' argument is DeAtleys failed to publicly disclose in the bankruptcy proceeding the "secret assignment", as set forth herein earlier. Respondents below, did not make this secret assignment argument and the courts did not adopt this secret assignment argument. The court simply held that the DeAtleys failed to disclose an asset of the corporation in which they held stock, this asset being a right of first refusal which was contained in the contract, which had been heretofore transferred, nearly two years prior to the filing of the petition, to AD3, with no remaining consideration due the debtor. No one gained unfair advantage, the assignment which is attached as an exhibit to Respondents brief required that AD3, the assignee, perform the rest of the road work. Washington law is very clear that in the case of this transfer the contract would not be enforceable unless the consideration flowing to Barnett, performance of the balance of the road work would be had.

Furthermore, Respondent position, is that the DeAtleys' position (page 15 of the Response Brief) was inconsistent with the public disclosures in bankruptcy, i.e., the scheduling of the debt which resulted in DeAtleys' obligation on that contract being discharged. Apparently, the Respondents have no argument with Washington law, because in fact, when this assignment was made, AD3 became responsible for the performance of the road work, if it was to exercise the right of first refusal. Likewise, any subsequent assignee, including DeAtley, who post-discharge received a reassignment of the contract, was obligated to perform the road work and admitted he had been required to do so.

The only thing the application of the judicial estoppel doctrine does is penalize the debtor for failure to make a disclosure not required by the Bankruptcy Code, i.e., to disclose the assets of a corporation in which it owned stock where the stock was admittedly scheduled.

The type of assignment engaged in by the debtors is relatively common in a simple form. For example, debtor has acquired a residence prior to the filing of petition on which there exists a mortgage and because of the press of debt has been forced, prior to the filing of the petition, to sell that house. The transfer of the title is subject to the obligation to pay a first mortgage debt existing on the property or lose the house. The debtor is not required to disclose that it owned the house, nor is it required to disclose the transfer of the house unless the transfer was made within one year prior to the filing of the petition. The debtor will always disclose and schedule, as a debt to be discharged, the obligation that it has on the mortgage as the debtor is generally not released by the mortgage company when the residence is transferred unless there is a new financing. In this situation, neither the debtors' purchaser or the debtor, if he re-acquires the residence after the discharge in bankruptcy, is penalized because he discharged his personal obligation on the residence. The mortgage and the obligation to pay the mortgage encumbers the house, just as the obligation to perform the road work encumbers the right of first refusal. The Respondents argued that because the debtor was discharged, and despite the fact that the transferee is responsible to perform the road work as a condition of the exercise of the right of first refusal, it too, should be discharged. We know that the only entity that receives a discharge of any

obligation in bankruptcy is the debtor. No one but the debtor can be accorded a discharge of any obligations under any contract, 11 U.S.C. § 727, with fairly rare exception.

2. Respondents indicate that the *Barger* case (*In re Barger,* 279 B.R. 900) has been overturned by *Barger v. City of Cartersville*, 348 F.3d 1289, 1285 (11th Cir. 2003). That is not accurate, *Barger v. City of Cartersville*, 348 F.3d 1289 (11th Cir. 2003) is a related proceeding. The *Barger* related case is in fact, a sad chronology of a comedy of errors. It does not stand for the proposition cited by Respondent. *Barger*, when she filed her bankruptcy petition did not disclose that she had a discrimination suit pending against the City. She did however tell her bankruptcy attorney that she orally informed the trustee of the existence of the case, however, her explanation of the cause of action was incorrect. She told the trustee that the suit only sought reinstatement to her position as personnel director as opposed to compensatory and punitive damages. *Barger* was granted a bankruptcy discharge. The City moved for summary judgement after the discharge of the basis of judicial estoppel. *Barger* moved to reopen her petition and be allowed to list the discrimination claim as an asset. At a hearing at which the City appeared, the bankruptcy judge allowed the reopening of the case. A week after that, the City's summary judgement motion was granted by the state court on the basis of estoppel or the lack of standing to sue. The bankruptcy court thereafter issued a written order from its hearing in which it said, that the debtor did not conceal the discrimination claim or attempt to obtain a financial advantage for herself. In the bankruptcy court's estimation, the failure to list

the discrimination suit was caused by her bankruptcy attorney's inadvertence and had no substantive effect on the bankruptcy. *Barger* moved the district court for reconsideration of its summary judgement order, which was denied and she filed a notice of appeal. This is in fact an appeal from the state court case on the issue of standing, questions, i.e., who could litigate the claim, *Barger* or the Trustee, because this claim was an asset of the estate. This was different from the instant case where the right of first refusal was never an asset of the estate and the only asset of the estate was scheduled, namely the AD3s stocks. The *Barger* Trustee would have been the real party in interest and would have had exclusive standing to assert the claim. The state court on appeal found that the trustee succeeded to debtors' position and the trial court found that the trustee would have succeeded to *Barger*'s position by virtue of the rules of civil procedure, F.R.C.P. 25(c). *Barger* then argued that the bankruptcy court ruling was collateral estoppel as to the ruling of the trial court. This issue had not been raised by *Barger* in the court below. She was therefore barred from raising it on the appeal. The court found however, that collateral estoppel wouldn't have aided her, since the bankruptcy court's decision was not reduced to writing until a week after the trial court ruled. It was simply not subject to argument. Furthermore, the City was not scheduled a creditor of the debtor and they lacked standing to litigate the judicial estoppel issue in the bankruptcy court since they had no standing to participate and argue in the bankruptcy court. The court held that it is as if the City had never argued before the bankruptcy court. Again, different than in DeAtley, where Barnett was admittedly scheduled. Collateral estoppel would not have applied, because the City would not have had a fair opportunity to litigate the judicial estoppel

issues in the bankruptcy court. In *Barger* they said the judicial estoppel would exist to, protect the integrity of the judicial process by prohibiting parties from deliberately changing position, according to exigencies at the moment and to prevent a party from exerting the claim in a legal preceding that is inconsistent with the claim taken by that party in the party in the previous proceeding. The court found that the issue was one of intent because the City had not been scheduled and had the opportunity to argue about this claim in the bankruptcy, a much different situation from the instant case. Needless to say, this *Barger* decision has nothing to do with the DeAtley case. There was no required disclosure, there was no failure to disclose. When the trustee asked about the assets of AD3, he was told about the assets of AD3, which were not assets of the DeAtley Chapter 7 estate. The trustee on his own made the determination about what to do and what not to do.

In fact, in *Barger* debtor was allowed to pursue her injunctive claim because the injunctive claim could not have added value to the estate, even if she had properly disclosed it. No one contests the fact that at the time of the DeAtley bankruptcy, DeAtley disclosed the asset of AD3, the right of first refusal to the trustee. The trustee found it to be a valueless asset of AD3 and nothing would have been gained by the bankruptcy estate from it. That being the case, the debtor obtained a discharge from the Chapter 7 and the doctrine of judicial estoppel, as set out in *Barger* would not be applicable.

CONCLUSION

For the foregoing reasons the Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

BEHLES LAW FIRM, P.C.
JENNIE DEDEN BEHLES
Attorney for the Petitioner
400 Gold Avenue, SW, Suite 680
P.O. Box 7070
Albuquerque, NM 87194-7070
Phone: (505) 242-7004
Fax: (505) 242-7066

LESLIE ALAN POWERS
POWERS & THERRIEN, P.S.
3502 Tieton Drive
Yakima, WA 98902
Phone: (509) 453-8906

JAMES A. PERKINS
LARSON & PERKINS P.L.L.C.
105 North Third Street
P.O. Box 550
Yakima, WA 98907
Phone: (509) 457-1515

11 U.S.C. § 727. Discharge.

(a) The court shall grant the debtor a discharge, unless –

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed –

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case –

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case –

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case

commenced within six years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least –

(A) 100 percent of the allowed unsecured claims in such case; or

(B)(i) 70 percent of such claims; and

(ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; or

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter.

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the

debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if –

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;

(2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee; or

(3) the debtor committed an act specified in subsection (a)(6) of this section.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge –

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of –

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

Bankruptcy Rule References: 1017, 2002, 4004, 4005, 4006, 4008 and 7001

Legislative History

This section is the heart of the fresh start provisions of the bankruptcy law. Subsection (a) requires the court to grant a debtor a discharge unless one of eight conditions is met. [*Ed. Note:* The Senate Report lists "nine" conditions.] The first condition is that the debtor is not an individual. This is a charge from present law, under which corporations and partnerships may be discharged in liquidation cases, though they rarely are. The change in policy will avoid trafficking in corporate shells and in bankrupt partnerships. "Individual" includes a deceased individual, so that if the debtor dies during the bankruptcy case, he will nevertheless be released from his debts, and his estate will not be liable for them. Creditors will be entitled to only one satisfaction – from the bankruptcy estate and not from the probate state.

The next three grounds for denial of discharge center on the debtor's wrongdoing in or in connection with the bankruptcy case. They are derived from Bankruptcy Act section 14c. If the debtor, with intent to hinder, delay, or defraud his creditors or an officer of the estate, has transferred, removed, destroyed, mutilated, or concealed, or has permitted any such action with respect to, property of the debtor within the year preceding the case, or property of the estate after the commencement of the case, then the debtor is denied discharge. The debtor is also denied discharge if he has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any books and records from which his financial condition might be ascertained, unless the act or failure to act was justified under all the circumstances of the case. The fourth ground for denial of discharge is the commission of a bankruptcy crime, though the standard of proof is

preponderance of the evidence rather than proof beyond a reasonable doubt. These crimes include the making of a false oath or account, the use or presentation of a false claim, the giving or receiving of money for acting or forbearing to act, and the withholding from an officer of the estate entitled to possession of books and records relating to the debtor's financial affairs.

The fifth ground for denial of discharge is the failure of the debtor to explain satisfactorily any loss of assets or deficiency assets to meet the debtor's liabilities. The sixth ground concerns refusal to testify. It is a change from present law, under which the debtor may be denied discharge for legitimately exercising his right against self-incrimination. Under this provision, the debtor may be denied discharge if he refuses to obey any lawful order of the court, or if he refuses to testify after having been granted immunity or after improperly invoking the constitutional privilege against self-incrimination.

The seventh ground of discharge is the commission of an act specified in grounds two through six during the year before the debtor's case in connection with another bankruptcy case concerning an insider.

[*House Report No. 95-595, 95th Cong., 1st Sess. 384 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 98 (1978).*]

Finally, if the debtor has been granted a discharge in a case commenced within six years preceding the present bankruptcy case, he is denied discharge. This provision, which is no change from current law with respect to straight bankruptcy, is the six-year bar to discharge. Under present law, but not under this bill, confirmation of a composition wage earner plan under chapter XIII is a basis for invoking the six-year bar.

[*House Report No. 95-595, 95th Cong., 1st Sess. 384-385 (1977).*]

The eighth ground for denial of discharge is derived from section 14c(5) of the Bankruptcy Act. If the debtor has been granted a discharge in a case commenced within six years preceding the present bankruptcy case, he is denied discharge. This provision, which is no change from current law with respect to straight bankruptcy, is the six-year bar to discharge. Discharge under chapter 11 will bar a discharge for six years. As under current law, confirmation of a composition wage earner plan under chapter 13 is a basis for invoking the six-year bar.

The ninth ground is approval by the court of a waiver of discharge.

[*Senate Report No. 95-989, 95th Cong., 2d Sess. 98-99 (1978).*]

Sections 727(a)(8) and (9) of the House amendment represent a compromise between provisions contained in section 727(a)(8) of the House bill and Senate amendment. Section 727(a)(8) of the House amendment adopts section 727(a)(8) of the House bill. However, section 727(a)(9) of the House amendment contains a compromise based on section 727(a)(8) of the Senate amendment with respect to the circumstances under which a plan by way of composition under chapter XIII of the Bankruptcy Act or chapter 13 of title 11 should be a bar to discharge in a subsequent proceeding under title 11. The paragraph provides that a discharge under sections 660 or 661 of the Bankruptcy Act or section 1328 of title 11 in a case commenced within six years before the date of the filing of the petition in a subsequent case, operates as a bar to discharge unless, first, payments under the plan totaled at least 100 percent

of the allowed unsecured claims in the case; or second, payments under the plan totaled at least 70 percent of the allowed unsecured claims in the case and the plan was proposed by the debtor in good faith and was the debtor's best effort.

It is expected that the Rules of Bankruptcy Procedure will contain a provision permitting the debtor to request a determination of whether a plan is the debtor's "best effort" prior to confirmation of a plan in a case under chapter 13 of title 11. In determining whether a plan is the debtor's "best effort" the court will evaluate several factors. Different facts and circumstances in cases under chapter 13 operate to make any rule of thumb of limited usefulness. The court should balance the debtor's assets, including family income, health insurance, retirement benefits, and other wealth, a sum which is generally determinable, against the forseeable necessary living expenses of the debtor and the debtor's dependents, which unfortunately is rarely quantifiable. In determining the expenses of the debtor and the debtor's dependents, the court should consider the stability of the debtor's employment, if any, the age of the debtor, the number of the debtor's dependents and their ages, the condition of equipment and tools necessary to the debtor's employment or to the operation of his business, and other foreseeable expenses that the debtor will be required to pay during the period of the plan, other than payments to be made to creditors under the plan.

Section 727(a)(10) of the House amendment clarifies a provision contained in section 727(a)(9) of the House bill and Senate amendment indicating that a discharge may be barred if the court approves a waiver of discharge

executed in writing by the debtor after the order for relief under chapter 7.

[*124 Cong. Rec. H 11,098 (Sept. 28, 1978); S 17,415 (Oct. 6, 1978).*]

Subsection (b) specifies that the discharge granted under this section discharges the debtor from all debts that arose before the date of the order for relief. It is irrelevant whether or not a proof of claim was filed with respect to the debt, and whether or not the claim based on the debt was allowed.

[*House Report No. 95-595, 95th Cong., 1st Sess. 385 (1977); Senate Report No. 95-989, 95th Cong., 2d Sess. 99 (1978).*]

Section 727(b) of the House amendment adopts a similar provision contained in the Senate amendment modifying the effect of discharge. The provision makes clear that the debtor is discharged from all debts that arose before the date of the order for relief under chapter 7 in addition to any debt which is determined under section 502 as if it were a prepetition claim. Thus, if a case is converted from chapter 11 or chapter 13 to a case under chapter 7, all debts prior to the time of conversion are discharged, in addition to debts determined after the date of conversion of a kind specified in section 502, that are to be determined as prepetition claims. This modification is particularly important with respect to an individual debtor who files a petition under chapter 11 or chapter 13 of title 11 if the case is converted to chapter 7. The Logical result of the House amendment is to equate the result that obtains whether the case is converted from another chapter to chapter 7, or whether the other chapter proceeding is dismissed and a new case is commenced by filing a petition under chapter 7.

[*124 Cong. Rec. H 11,098 (Sept. 28, 1978); S 17,415 (Oct. 6, 1978).*]

Subsection (c) permits the trustee, or a creditor, to object to discharge. It also permits the court, on request of a party in interest, to order the trustee to examine the acts and conduct of the debtor to determine whether a ground for denial of discharge exists.

Subsection (d) requires the court to revoke a discharge already granted in certain circumstances. If the debtor obtained the discharge through fraud, if he acquired and concealed property of the estate, or if he refused to obey a court order or to testify, then the discharge is to be revoked.

Subsection (e) permits the trustee or a creditor to request revocation of a discharge within one year after the discharge is granted, on the grounds of fraud, and within one year of discharge or the date of the closing of the case, whichever is later, on other grounds.

[*Senate Report No. 95-989, 95th Cong., 2d Sess. 99 (1978); See also House Report No. 95-595, 95th Cong., 1st Sess. 385 (1977).*]

Comment

Section 727 is derived from Section 14c of the former Bankruptcy Act.

In general, the grounds to bar discharge under the Code are not unlike the grounds enumerated in Section 14c of the Act.

It should be noted that paragraph (1) of section 727 makes it clear that only an individual may obtain a

discharge. Under the Act a partnership or corporation could be discharged, although such entities rarely exercised the privilege.

The second, third, fourth and fifth grounds of section 727(a) to bar discharge are derived directly from Section 14c of the Act. The sixth ground is a change from prior law under which a debtor may have been denied discharge for legitimately exercising his constitutional right to invoke the privilege against self-incrimination. Under the Code, the debtor may be denied a discharge if he refuses to obey a lawful order of the court or refuses to testify after having been granted immunity or after improperly invoking the constitutional privilege against self-incrimination.

The seventh ground in section 727(a) has no comparable provision in the Act. Discharge may be denied to an individual who committed one of the acts that bar discharge specified in grounds two through six during the year before the debtor's cases *in connection with another case involving an insider.*

The eighth ground to bar discharge is a previous discharge within six years before filing the petition in a liquidation case or a reorganization case under the Code or under the former Bankruptcy Act.

The ninth ground would bar discharge of a debtor who obtained a discharge within six years before the filing of the petition, in a chapter 13 case under the Code or in a Chapter XIII case under the Act unless (A) 100 percent of allowed unsecured claims were paid in the previous case, or (B) 70 percent of such claims were paid *and* the plan was proposed by the debtor in good faith and was the debtor's best effort. As suggested in the Congressional Record, the Rules of Bankruptcy will probably provide for

the debtor to request a hearing to determine whether the plan was the debtor's best effort. The Congressional Record suggests what factors should enter into the determination of "best effort."

The tenth bar to discharge is a written waiver of discharge, executed *after* the order for relief under chapter 7 and *approved by the court.* Section 14a of the Act provided that the bankrupt could, before the hearing on the application for discharge, waive his discharge by a writing filed with the court. Court approval was not required.

Section 727(b) specifies that the discharge releases the debtor from all debts that arose prior to the order for relief regardless of whether or not a proof of claim was filed with respect to the debt, and whether or not the claim was allowed.

Section 727(c) provides that the trustee or a creditor or the United States trustee may object to discharge.

Subsections (d) and (e) of section 727 relate to revocation of discharge and were derived from Section 15 of the Act.

Bankruptcy Rule 4004 relates to discharge. Subdivision (a) provides that a complaint objecting to the debtor's discharge pursuant to section 727(a) is to be filed, in a chapter 7 case, not later than 60 days after the first date set for the meeting of creditors held under section 341(a). In a chapter 11 case, the complaint must be filed not later than the first date set for the confirmation hearing. Not less than 25 days notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k), and to the trustee and the trustee's attorney. [The 1991 Amendments require notice to the

United States trustee to conform to section 727(c) of the Code which gives the United States trustee the right to object to discharge.]

Subdivision (b) of the Rule authorizes the court, on motion of a party in interest, after hearing on notice to extend, for cause, the time for filing a complaint objecting to discharge, provided that the time to file has not expired. The motion for an extension must be made within the original time period.

Subdivision (c) of the Rule provides that in a chapter 7 case, on expiration of the time for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case pursuant to Rule 1007(e), the court shall forthwith grant the discharge unless (1) the debtor is not an individual, (2) a complaint has been filed objecting to discharge, (3) the debtor filed a waiver of discharge (section 727(a)(10)), or (4) a motion to dismiss the case under Rule 1017(e) is pending. The court may, however, on motion of the debtor, defer entry of the order of discharge for 30 days, and on motion made within such period, may defer entry of the order to a date certain. [Section 524(c) authorizes a debtor to enter into an enforceable reaffirmation agreement only before entry of the discharge order. Deferring the entry of the order allows time for the debtor to enter into such agreemeents.]

Subdivision (d) of the Rule makes a proceeding commenced by a complaint objecting to discharge an adversary proceeding governed by Part VII of the rules. See also Rule 7001. (Pursuant to Rule 5005, the complaint should be filed with the clerk in the district in which the case is pending.)

Subdivision (e) of the Rule requires an order of discharge to conform to Official Form No. 18.

Subdivision (f) of the Rule provides that a final order of discharge may be registered in any other district by filing a certified copy of the order with the clerk of that district, and when so registered, the order shall have the same effect as an order of that district.

Subdivision (g) of the Rule requires the clerk to promptly mail a copy of the final order of the discharge to all creditors and to the trustee and trustee's attorney (and to the United States trustee). (Rule 2002 specifies the manner of the notice and persons to whom notice must be given.)

Bankruptcy Rule 4005 places the burden of proving the objection to a discharge upon the plaintiff.

Bankruptcy Rule 4006 provides that after an order denying or revoking discharge becomes final, or if a waiver of discharge is filed, the clerk shall promptly give notice thereof to all creditors and to the United States trustee as provided in Rule 2002.

Bankruptcy Rule 4008 provides that the court must hold the section 524(d) discharge hearing within no more than 30 days after entry of an order granting or denying a discharge on not less than 10 days notice to the debtor and the trustee. A debtor's motion for approval of a reaffirmation agreement must be filed at or before the hearing.

Bankruptcy Rule 7041 adopts Fed. R. Civ. P. 41 relating to dismissal of actions, but provides that a complaint objecting to discharge shall not be dismissed at plaintiff's instance save on notice to the trustee, the United States trustee, and such other persons as the court

may direct, and upon order containing terms and conditions deemed appropriate.

Bankruptcy Rule 9024 makes it clear that the time to file a complaint to revoke a discharge pursuant to section 727(e) or to revoke an order confirming a plan unders sections 1144, 1230 and 1330 may not be circumvented by invoking Fed. R. Civ. P 60(b).

1984 Amendments: Paragraph (7) of section 727(a) was amended by adding language indicating that the paragraph applies to a case under the Bankruptcy Act as well as to a case under the Code. Clarifying changes were made in subsections (c)(1) and (e)(2)(A).

1986 Amendments: Section 727(c)(1) was amended to authorize the United States trustee to object to the discharge of a debtor under section 727(a). Subsections (d) and (e) were amended to authorize the United States trustee to move to revoke a discharge.

This section was amended to reflect the creation of a permanent United States trustee system. Section 302(d) of the 1986 Amendments provides difterent effective dates for the amendments relating to the United States trustee system. *See* Section 302 of the 1986 Amendments, reprinted herein under "Selected Provisions of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986," regarding effective dates generally.

1990 Amendments: Section 302(d)(3) of the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986 was amended by Pub. L. No. 101-650 (Judicial Improvements Act of 1990) to extend the period in which the judicial districts in the states of

Alabama and North Carolina may remain outside the United States trustee system and to insert new language pertaining to the effective date of the 1986 amendment to section 105 of title 11.

OFFICIAL FORMS

Form 7 Statement of Financial Affairs

UNITED STATES BANKRUPTCY COURT
..... DISTRICT OF .....

In re ..... Case No. .....
(Name) (If known)

Debtor

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

Questions 1-15 are to be completed by all debtors. Debtors *that are or have been in business, as defined below*, also must complete questions 16-21. **If the answer to any question is "none," or the question is not applicable, mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within the two years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or person in control of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any person in control of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101.

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1. Income from employment or operation of business

None ☐ State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under

chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE (if more than one)

2. Income other than from employment or operation of business

None ☐ State the amount of income received by the debtor other than from employment, trade, profession, or operation of the debtor's business during the **two years** immediately preceding the commencement of this case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income for each spouse whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE

3. Payments to creditors

None ☐ a. List all payments on loans, installment purchases of goods or services, and other debts, aggregating more than $600 to any creditor, made within **90 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING

None ☐ b. List all payments made within **one year** immediately preceding commencement of this case to or for the benefit of creditors who are or were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR AND RELATIONSHIP TO DEBTOR	DATE OF PAYMENT	AMOUNT PAID	AMOUNT STILL OWING

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4. Suits and administrative proceedings, executions, garnishments and attachments

None ☐ a. List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT OR AGENCY AND LOCATION	STATUS OR DISPOSITION

None ☐ b. Describe all property that has been attached, garnished or seized under any legal or equitable process within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed,

unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON FOR WHOSE BENEFIT PROPERTY WAS SEIZED	DATE OF SEIZURE	DESCRIPTION AND VALUE OF PROPERTY

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5. Repossessions, foreclosures and returns

None ☐ List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR OR SELLER	DATE OF REPOSSESSION, FORECLOSURE SALE, TRANSFER OR RETURN	DESCRIPTION AND VALUE OF PROPERTY

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6. Assignments and receiverships

None ☐ a. Describe any assignment of property for the benefit of creditors made within **120 days** immediately preceding the commencement of this case. (married debtors filing under chapter 12 or chapter 13 must include any assignment by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF ASSIGNEE	DATE OF ASSIGNMENT	TERMS OF ASSIGNMENT OR SETTLEMENT

None ☐ b. List all property which has been in the hands of a custodian, receiver, or court-appointed official within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CUSTODIAN	NAME AND LOCATION OF COURT CASE TITLE & NUMBER	DATE OF ORDER	DESCRIPTION AND VALUE OF PROPERTY

7. Gifts

None ☐ List all gifts or charitable contributions made within **one year** immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than $200 in value per individual family member and charitable contributions aggregating less than $100 per recipient. (Married debtors filing under chapter 12 or chapter 13 must include gifts or contributions by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON OR ORGANIZATION	RELATIONSHIP TO DEBTOR, IF ANY	DATE OF GIFT	DESCRIPTION AND VALUE GIFT

8. Losses

None ☐ List all losses from fire, theft, other casualty or gambling within **one year** preceding the commencement of this case **or since the commencement of this case**. (Married debtors filing under chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

DESCRIPTION AND VALUE OF PROPERTY	DESCRIPTION OF CIRCUMSTANCES AND IF LOSS WAS COVERED IN WHOLE OR IN PART BY INSURANCE, GIVE PARTICULARS	DATE OF LOSS

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9. Payments related to debt counseling or bankruptcy

None ☐ List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS OF PAYEE	DATE OF PAYMENT, NAME OF PAYOR IF OTHER THAN DEBTOR	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

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10. Other transfers

None ☐ a. List all other property, other than property transferred in the ordinary course of the business

or financial affairs of the debtor, transferred either absolutely or as security within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF TRANSFEREE, RELATIONSHIP TO DEBTOR	DATE	DESCRIBE PROPERTY TRANSFERRED AND VALUE RECEIVED

11. Closed financial accounts

None ☐ List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within **one year** immediately preceding the commencement of this case. Include checking, savings, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations, brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by or for either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF INSTITUTION	TYPE AND NUMBER OF ACCOUNT AND AMOUNT OF FINAL BALANCE	AMOUNT AND DATE OF SALE OR CLOSING

12. Safe deposit boxes

None ☐ List each safe deposit or other box or depository in which the debtor has or had securities, cash, or other valuables within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF BANK OR OTHER DEPOSITORY	NAMES AND ADDRESSES OF THOSE WITH ACCESS TO BOX OR DEPOSITORY	DESCRIPTION OF CONTENTS	DATE OF TRANSFER OR SURRENDER IF ANY

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13. Setoffs

None ☐ List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within **90 days** preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF

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14. Property held for another person

None ☐ List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY

15. Prior address of debtor

None ☐ If the debtor has moved within two years immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

ADDRESS	NAME USED	DATES OF OCCUPANCY

The following questions are to be completed by every debtor that is a corporation or partnership and by any individual debtor who is or has been, within the two years immediately preceding the commencement of this case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or otherwise self-employed.

(*An individual or joint debtor should complete this portion of the statement* ***only*** *if the debtor is or has been in business, as defined above, within two years immediately preceding the commencement of this case.*)

16. Nature, location and name of business

None ☐ a. If the debtor is an individual, list the names and addresses of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship, or was a self-employed professional within the **two**

years immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the two years immediately preceding the commencement of this case.

b. If the debtor is a partnership, list the names and addresses of all businesses in which the debtor was a partner or owned 5 percent or more of the voting securities, within the **two years** immediately preceding the commencement of this case.

c. If the debtor is a corporation, list the names and addresses of all businesses in which the debtor was a partner or owned 5 percent or more of the voting securities within the **two years** immediately preceding the commencement of this case.

NAME	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES OF OPERATION

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17. Books, records and financial statements

None ☐ a. List all bookkeepers and accountants who within the **six years** immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.

NAME AND ADDRESS	DATES SERVICES RENDERED

None ☐ b. List all firms or individuals who within the **two years** immediately preceding the filing of this bankruptcy case have audited the books of account and records, or prepared a financial statement of the debtor.

NAME	ADDRESS	DATES SERVICES RENDERED

None ☐ c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor. If any of the books of account and records are not available, explain.

NAME	ADDRESS

None ☐ d. List all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued within the **two years** immediately preceding the commencement of this case by the debtor.

NAME AND ADDRESS	DATE ISSUED

18. Inventories

None ☐ a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

DATE OF INVENTORY	INVENTORY SUPERVISOR	DOLLAR AMOUNT OF INVENTORY (Specify cost, market or other basis)

None ☐ b. List the names and address of the person having possession of the records of each of the two inventories reported in a., above.

DATE OF INVENTORY	NAME AND ADDRESSES OF CUSTODIAN OF INVENTORY RECORDS

19. Current Partners, Officers, Directors and Shareholders

None ☐ a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

NAME AND ADDRESS	NATURE OF INTEREST	PERCENTAGE OF INTEREST

None ☐ b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting securities of the corporation.

NAME AND ADDRESS	TITLE	NATURE AND PERCENTAGE OF STOCK OWNERSHIP

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20. Former partners, officers, directors and shareholders

None ☐ a. If the debtor is a partnership, list each member who withdrew from the partnership within **one year** immediately preceding the commencement of this case.

NAME	ADDRESS	DATE OF WITHDRAWAL

None ☐ b. If the debtor is a corporation, list all officers, or directors whose relationship with the corporation terminated within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS	TITLE	DATE OF TERMINATION

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21. Withdrawals from a partnership or distributions by a corporation

None ☐ If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other prquisite during **one year** immediately preceding the commencement of this case.

NAME & ADDRESS OF RECIPIENT, RELATIONSHIP TO DEBTOR	DATE AND PURPOSE OF WITHDRAWAL	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

* * *

[*If completed by an individual or individual and spouse*] I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

Date ..... Signature of Debtor .....

Date ..... Signature of Joint ..... Debtor (if any)

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

. . . .

Penalty for making a false statement: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. § 152 and 3571

Advisory Committee Note – 1991 Amendment

This form consolidates questions from former Official Forms No. 7, No. 8, and No. 10. This form is to be completed by all debtors. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

The Chapter 13 Statement, former Official Form No. 10, has been abrogated. Chapter 13 debtors are to complete this statement and the schedules prescribed in Official Form 6.

All questions have been converted to affirmative directions to furnish information, and each question must be answered. If the answer is "none," or the question is not applicable, the debtor is required to so state by marking the box labeled "None" provided at each question.

See Committee Note to Form 2 for a discussion of the unsworn declaration at the end of this form.

Advisory Committee Note – 1993 Amendment

The form has been amended in two ways. In the second paragraph of the instructions, the third sentence has been deleted to clarify that only a debtor that is or has been in business as defined in the form should answer Question 16-21. In addition, administrative proceedings have been added to the types of legal actions to be disclosed in Question 4.a.

Advisory Committee Note – 1995 Amendment

This form is a "document for filing" that may be prepared by a "bankruptcy petition preparer" as defined in 11 U.S.C. § 110, which was added to the Code by the Bankruptcy Reform Act of 1994; accordingly, a signature line for such preparer is added. In addition to signing, a bankruptcy petition preparer is required by section 110 to disclose the information requested.